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In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*

Respondent.

PETITION FOR REHEARING

HENRY E. FOLEY,
Counsel for Petitioner

Dated: December 12, 1944

GEORGE H. DEAN CO., PRINTERS, BOSTON

In The Supreme Court of The United States

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Respondent.

PETITION FOR REHEARING

Now comes J. F. Fitzgerald Construction Company, petitioner herein, by Henry E. Foley, its counsel, and respectfully represents to this Honorable Court as follows:

1. On September 13, 1944, your petitioner filed herein its petition, entitled—Petition for Writ of Certiorari to the Supreme Court of the State of New York—for the purpose of obtaining review and determination of a judgment entered in said Court, upon remittitur from the Court of Appeals of the State of New York, in an action originally commenced by the respondent herein in said New York Supreme Court to recover overtime compensation and liquidated damages in accordance with the provisions of

Section 16 (b) of the Fair Labor Standards Act of 1938, a Federal statute. In said petition your petitioner requested consideration and review of the following two questions:

(1) Whether the entry of judgment for the plaintiffs by the Supreme Court of the State of New York on the record before it (which wholly fails to show the nature of the work done by any plaintiff at any time, except merely that your petitioner entered into a contract for the reconstruction and repair of certain bridges of an interstate carrier and that the plaintiffs and others were employed by your petitioner "in doing work" under that contract) is in conflict with the decisions of this Court and constitutes a violation of the prior mandate of this Court.

(2) Whether interest may be added to the statutory double damages in making an award to employees in an action under Section 16 (b) of the Fair Labor Standards Act of 1938.

2. On November 6, 1944, this Court granted your petitioners said petition for writ of certiorari, but limited said grant to the second question presented by said petition. The terms of the order of this Court are as follows:

"The petition for writ of certiorari is granted limited to the second question presented to the petition for the writ and the case is transferred to the summary docket and assigned for argument immediately following No. 421. The Solicitor General is invited to file a brief amicus curiae in this case and in No. 421 (Arsenal Building Corporation v. Greenberg, October Term, 1944) if so advised."

3. After the entry of said order of this Court on November 6, 1944, your petitioner caused to be filed in the Court of Appeals of the State of New York a petition seeking amendment of the remittitur of said Court so as to state more explicitly the ground of its decision and so as

more fully to reveal that, in issuing said remittitur, said court had necessarily passed upon a question of federal law which your petitioner believes is an important federal question and one which should be reviewed by this Court.

4. On December 2, 1944, the Court of Appeals of the State of New York granted your petitioner's motion and ordered said remittitur amended by adding thereto the following:

> "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."

A copy of the order of the Court of Appeals amending its remittitur is attached hereto, made part hereof and marked "A" and a certified copy thereof has been filed with the Clerk of this Court.

5. From said order of the Court of Appeals of the State of New York, it is now apparent that the Court of Appeals, in sustaining judgment for the respondent herein, decided a question of Federal Law and that the respondent erred when it represented to this Court in its brief filed herein and entitled—Brief in Opposition to Petition for Writ of Certiorari—that:

> "The only issue determined by the State courts, and the only issue presented to this Court, is one of civil procedure. *The petitioner herein could easily have required of the plaintiff* (Pedersen) *proof of the details of each*

worker's duties, by merely interposing on the motion for summary judgment a short answering affidavit." (P. 9) (Italics and parenthetical insertion supplied).

By its order the Court of Appeals has now made clear (1) that its decision did not rest on the procedural ground, claimed by the respondent, (namely, that your petitioner, by failing to file an affidavit of defense in response to respondent's motion for summary judgment, had relieved the respondent of its admitted burden of proving the nature of the activity of the employees on whose behalf the suit was brought) and (2) that said decision of the Court of Appeals did rest on the substantive ground that the respondent established a prima facie case by showing that the employees were employed in doing work (whatever that work may have been) under your petitioner's contract for the repair of an instrumentality of commerce and that, upon such showing, without more, your petitioner had the burden of going forward with evidence to show that the employees, on whose behalf the respondent is suing, were not doing work "so closely related to commerce as to be in practice and in legal contemplation a part thereof," within the meaning of that phrase in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125 and *McLeod* v. *Threlkeld*, 319 U. S. 491.

6. The Court of Appeals has by its recent order made clear that it has decided a federal question of substance—namely that of the extent of the burden of proof in a proceeding under the Fair Labor Standards Act of 1938. The Court of Appeals has now made clear that it has decided (1) that employees establish a "prima facie" case merely by showing that they are engaged in a project in the course of which certain separable and identifiable activity is admittedly intrastate in character and certain other such activity is admittedly interstate, without any showing as

to the particular activity in which they, or any of them, were at any time engaged, and (2) that upon such "prima facie" showing the employer has the burden of going forward with evidence to show in defense that the activity of particular employees was in fact intrastate. Such a decision is obviously a decision of a federal question of substance. The question of the extent of the burden of proof under a federal statute such as this, is clearly a federal question. This, the Court of Appeals has recognized expressly in its amended remittitur when it stated that "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938." And in this conclusion, that the matter of the extent of the burden of proof is a Federal question, the Court of Appeals was clearly right. Uniform interpretation and application must be given to such a statute, and, as held by this Court in *Garrett* v. *Moore-McCormack Co., Inc., et al,* 317 U. S. 239, 244 (1942):

> "This uniformity requirement extends to the type of proof necessary for judgment."

Numerous decisions of this Court support this conclusion. Thus, in *Central Vermont Railway* v. *White, Administratrix of White,* 238 U. S. 507 (1915), this Court said with respect to the matter of proof in an action under the Federal Employers' Liability Act:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNiel* v. *Holbrook,* 12 Pet. 89. But matters of substance and procedure must not be confounded because they happen to have the same name."

> "*So, too, as to the burden of proof.* As long as the question involves a mere matter of procedure as to the

time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law.

"But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure." (P. 511-512).

Similarly, in *New Orleans and Northeastern Railroad Company* v. *Harris*, 247 U. S. 367 (1918) this court said, in a similar proceeding:

"These established principles and our holding in *Central Vermont Railway Co.* v. *White*, 238 U. S. 507, 511, 512, we think make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states." (P. 372)

and in *Gulf, Mobile & Northern Railroad Company* v. *Wells*, 275 U. S. 455 (1928) this Court pointed out,

"Hence, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient, in kind or amount, to warrant a finding that the negligence of the engineer was the cause of the injury, the judgment must be reversed." (P. 457).

7. The Court of Appeals has erroneously decided the important Federal question as to the extent of the showing which must be made to warrant recovery under the Act. The Court of Appeals has, in substance, held that the employees on whose behalf the respondent is suing are entitled to recover on a mere showing that they *might* have been engaged in commerce, that is upon a showing of the nature of their employer's business and that their employment in such business *might* have been, although it admittedly need not have been, "so closely related to commerce as to be in practice and in legal contemplation a part of it". The respondent has shown only (1) that *your peti-*

tioner was engaged in a project calling for the repair of an instrumentality of commerce and (2) that the employees on whose behalf the respondent is suing, were employed in doing work related to that project. In a project such as that in which your petitioner was engaged, there are obviously many separable activities, some of which (such as actual repair work) if performed by the employees represented by the respondent, would constitute engagement in commerce and others of which (such as preliminary and incidental or salvaging work) obviously would not constitute such engagement (See pages 10 to 13 of our Petition for Certiorari filed herein and dated September 11, 1944). That such divergent activities existed has been recognized by the respondent in its brief in opposition to our petition. (See quotation therefrom in paragraph 5 hereof). The existence of such divergent activities has also been recognized by the Court of Appeals, as is apparent from its amended remittitur. The Court of Appeals has concluded, however, that, on a showing that employees, on whose behalf the respondent is suing, (and these employees are only some, not all, of the employees engaged on the project (R. 9)) were engaged on a project, certain separable and identifiable activity in connection with which would necessarily not have been so closely related to commerce as to be a part of it and without any showing as to the particular activity of any employee in any week or at any time, the respondent has the burden of going forward with evidence to show the nature of the activity of the particular employees. Such a conclusion is in direct conflict with the decision of this Court in *Warren Bradshaw Drilling Company* v. *Hall*, 317 U. S. 88 (1942), and of other courts which have passed upon the question of the extent of an employee's burden of proof under the Act. Thus in the *Warren Bradshaw Drilling Company* case, this Court said,

"The burden was therefore upon respondents to prove that in the course of performing their services for peti-

tioner and *without regard to the nature of its business*, they were, as its employees, engaged in the production of goods within the meaning of the Act, and that such production was for interstate commerce.". (Italics supplied). (P. 90).

Similarly in *Super-Cold Southwest Company* v. *McBride*, 124 Fed. (2d) 90 (1941) the Circuit Court of Appeals for the Fifth Circuit held that,

> "An employee working both interstate and intrastate must point out what part of his work was in intrastate commerce and what part in interstate commerce." (P. 92).

So also in *Schwartz* v. *Witwer Grocer Co.*, 47 F.S. 1003 (No. D. Iowa) (1943) the Court pointed out

> "The weight of authority clearly indicates that when the employee works both in intrastate and interstate commerce, the burden is upon him to point out what part of his work was in intrastate and what part in interstate commerce, and the extent of the interstate work and when performed." (P. 1004).

(See accord *Armour & Co.* v. *Carpenter*, 141 Pac (2d) 797 (Okl.) (1943)). It is obvious that the respondent has not borne the burden of proof required by said decisions and that the Court of Appeals erred in its holding.

8. Strong reasons exist for review by this Court of the judgment herein. The Fair Labor Standards Act of 1938 is a statute of major public significance. Vast numbers of employers and employees are affected thereby. No doubt should exist as to the extent of the burden of proof in proceedings under the Act. If, as is believed, the matter of burden of proof has already been settled by this Court in *Warren-Bradshaw Drilling Co.* v. *Hall* (*supra*) the Court of Appeals of the State of New York has decided this proceeding in direct conflict with the holding of this Court

therein and judgment should be reversed. Your petitioner should not be prejudiced by an erroneous decision of a State Court. If, on the other hand, the *Warren-Bradshaw Drilling Co.* decision is not controlling, the law on the point should be settled. Employers and employees should be able to know the requirements as to proof in proceedings under the Act. Rights should not be lost because of uncertainty in this regard.

WHEREFORE, your petitioner respectfully prays that this petition for a rehearing be granted and that the limitation, imposed by the order of this Court herein dated November 6, 1944, in granting a writ of certiorari, be removed.

Respectfully submitted,

HENRY E. FOLEY.
Counsel for Petitioner

"A"

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the *thirtieth* day of *November*, A. D. *1944*.

PRESENT, HON. IRVING LEHMAN,
Chief Judge, Presiding.

CHRIS PEDERSEN, *ind., and as Agent and Representative for and in behalf of himself and all other Employees of the Defendant similarly situated,*

Respondent,

vs.

J. F. FITZGERALD CONSTRUCTION COMPANY,
Appellant.

A motion to amend the remittitur in the above cause having heretofore been made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the remittitur amended by adding thereto the following:

"Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal

statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."

AND the Supreme Court, Columbia County, State of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

RAYMOND J. CANNON
Deputy Clerk.

(SEAL)

SUPREME COURT OF THE UNITED STATES.

No. 462.—October Term, 1944.

J. F. Fitzgerald Construction Company, Petitioner,
vs.
Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself, etc.

On Writ of Certiorari to the Supreme Court of the State of New York.

[April 9, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

The writ of certiorari in the instant case raises two questions for consideration: the first, whether an employee who obtains a judgment for unpaid overtime wages and liquidated damages under Section 7(a)[1] and Section 16(b)[2] of the Fair Labor Standards Act of 1938 is entitled to interest on such sums; the second, a narrow question with respect to the interpretation of a judgment of this Court, which was entered in its per curiam opin-

[1] Section 7(a), 52 Stat. 1063, provides:
"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
(2) for a workweek longer than forty-two hours during the second year from such date, or
(3) for a workweek longer than forty hours after the expiration of the second year from such date,
unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[2] Section 16(b), 52 Stat. 1069, provides:
"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

ion on a prior writ of certiorari, reversing a prior state court judgment in this same case.

The proceedings leading to the first writ began when the respondent, Pedersen, an employee of the petitioner, a construction company, instituted an action in the Supreme Court of the State of New York, in behalf of himself and other employees, to recover overtime compensation and liquidated damages alleged to be due by virtue of Sections 7 and 16(b) of the Fair Labor Standards Act. The action was tried on an agreed statement of facts which stated that the New York Central Railroad Company operated interstate trains over four bridges located on its right of way in the State of New York; that abutments supporting two bridges were destroyed and that the substructures of the two other bridges were damaged by a flood. The stipulation also stated:

> "Thereafter, the railroad company entered into a contract with the defendant, an independent contractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.
>
> . . . . . .
>
> "Defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule 'A' annexed hereto."

After making findings of fact in conformity with the stipulation, the trial court dismissed the respondents' complaint.[3] The Appellate Division[4] and Court of Appeals[5] affirmed the lower court decision on the theory that the nature of the employer's general business activity—not the activities of employees on a particular job—determined whether an employee was "engaged in [interstate] commerce" within the meaning of Section 7(a) of the Act. Since the petitioner, an independent contractor not itself engaged in interstate commerce, was employed by the railroad to perform work local in character, it was felt petitioner's employees were not subject to the Act. On petition for certiorari, this Court reversed[6] the judgment of the state courts dismissing

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[3] Pedersen *v.* Fitzgerald Constr. Co., 173 Misc. 188.

[4] *Ibid.*, 262 App. Div. 665.

[5] *Ibid.*, 288 N. Y. 687, affirming without opinion.

[6] *Ibid.*, 318 U. S. 740.

the complaint, on the authority of *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, in which the Fair Labor Standards Act was held to apply to employees engaged in the actual repair of a facility of interstate commerce. On petition for rehearing by the petitioner in the instant case, our judgment was amended by adding:

> "and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." 318 U. S. 742.

This left open for trial the question of whether each member of the class was engaged in interstate commerce as alleged in the petition.

After remand to the state courts, the petitioner moved in the trial court to dismiss the complaint on the record of the prior proceedings apparently on the theory that the agreed statement of facts in the prior proceedings were insufficient to prove that the respondents, employees, were "engaged in [interstate] commerce." Petitioner did not attempt to introduce any evidence rebutting any inference to the contrary that might be drawn from the stipulation of facts in the record. Respondents thereupon moved for summary judgment under Rule 113 of the New York Rules of Civil Practice. The lower court entered judgment for the respondents, employees, for statutory wages and liquidated damages, with interest on such sums from April 1, 1939.[7] The Appellate Division[8] and Court of Appeals affirmed this decision.[9] Because the allowance of interest by the Court of Appeals raised a federal question of substance not heretofore determined by this Court, and in order to clarify doubts as to the meaning of our previous judgment in this case, we granted certiorari.[10] Jurisdiction of this Court rests on Section 237(b) of the Judicial Code.

In *Arsenal Building Corporation, et al.* v. *Greenberg*, No. 421, 1944 Term, decided this day, we held that an employee was not entitled to interest on sums recovered in an action brought under Section 16(b) of the Fair Labor Standards Act. This question is discussed in that opinion and for the reasons set forth therein, we hold that the New York Court of Appeals erred in allowing

[7] Opinion unreported.

[8] Pedersen v. Fitzgerald Constr. Co., 266 App. Div. 1032.

[9] Ibid., 293 N. Y. 126.

[10] 323 U. S. —.

interest on the sums recovered by the respondents in the instant case.

Petitioner contends that the state courts erred in sustaining a judgment for respondents. It is argued that the latter failed to satisfy the burden of proof that the particular activities of the respondents constituted engaging "in [interstate] commerce." We are of a contrary opinion. The agreed statement of facts, which was part of the record both for purposes of petitioner's motion to dismiss and respondents' motion for summary judgment, constitutes sufficient evidence to support the state courts' ruling in this matter.[11] The agreed statement of facts states that the petitioner entered into a contract with the railroad "for the construction of entirely new abutments under the two bridges . . . . and for repairing the substructures of the other two bridges," all four of these bridges being part of the railroad's interstate line. It was also stipulated that the respondents were "doing work under said contract." It is clear that employees who actually repair abutments or substructures of bridges on which are laid tracks used in interstate transportation are "engaged in [interstate] commerce." *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 130; *McLeod* v. *Threlkeld*, 319 U. S. 491, 494. The stipulation of facts in this case recites specifically and precisely that the contract was for such work and also that the respondents were engaged in doing work under said "contract." The stipulation of facts would not seem to embrace activities not essential and a part of the main work of repair. This interpretation of the stipulation accords with that adopted by the state trial court.[12] In amending our judgment on rehearing[13] when this case was previously before us on writ of certiorari, the way was opened to petitioner to contest the issue of whether each respondent was himself actually engaged in interstate commerce. A doubt had arisen as to whether this could be done because our judgment of reversal was based explicitly

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[11] See p. 2 *supra*.

[12] The New York trial court stated in its opinion [unreported]:

"The fair import of these conceded facts is that defendant was engaged in certain work, and that plaintiff and his associates were its employees, not generally, but in doing *this particular work*. . . . But in any event the conceded facts, in my judgment, embrace no activities not essential to the main work of repair (Pedersen *v.* Delaware, Lackawanna & Western Railroad Co 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made. . . ."

[13] 318 U. S. 742.

on the *Overstreet* case, and in that decision we conclusively determined that the particular employees there involved were covered by the Act. On the remand to the state courts, petitioner did not contest respondents' claim on this issue although it appears it could have done so when the respondents moved for summary judgment.[14] Since the uncontested facts in the record are to the effect that the respondents were actually engaged in repairing the abutments and substructure, the judgment of the state court must be sustained in this respect.

The judgment of the state court is affirmed except in so far as it provides for recovery of interest on the sums adjudged to be due respondents under the Act; in this latter respect the judgment is reversed.

[14] The trial court stated in its opinion [unreported]:

"It was no more a direction to the plaintiff than it was a permission to the defendant to reopen the matter, if either so desired, and could so do under our practice, for the purpose of getting further proof as to the precise activities of plaintiff and his associates."